Supreme Ct.
FILED

No. 05-888 OCT 7 - 2005

OFFICE OF THE CLERK

In The
Supreme Court of the United States

PRISCILLA EVERETTE-OATES,
AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF MAGGIE OATES
Petitioner,

v.

JO ANNE B. BARNHART, COMMISSIONER OF
SOCIAL SECURITY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The general procedure of a Social Security disability inquiry is well established. Five questions are to be asked sequentially during the course of a disability determination. §§ 20 C.F.R. 404.1520, 1520a (1988). An Administrative Law Judge must consider (1) whether the claimant is engaged in substantial gainful activity, (2) whether the claimant has a severe impairment, (3) whether the claimant has an impairment that meets or equals a condition contained within the Social Security Administration's official list of impairments, (4) whether the claimant has an impairment which prevents past relevant work, and (5) whether the claimant's impairment prevents the performance of any substantial gainful employment. An ALJ's factual determinations must be upheld if supported by substantial evidence, *Smith v. Schweiker*, 795 F.2d 343, 345 (4th Cir. 1986).

The ALJ has a duty to weigh and address all the competent evidence in the record, which bears on the outcome. In the course of this analysis, "[t]he ALJ has a duty to explore all relevant facts and inquire into the issues necessary for adequate development of the record, and cannot rely only on the evidence submitted by the claimant when that evidence is inadequate." *Cook v. Heckler, 783* F.2d 1168, 1173 (4th Cir. *1986).* The Secretary must analyze all relevant evidence and state the weight afforded to the evidence before denying a claim for benefits. *Gordon v. Schweiker, 725* F.2d 231, *236* (4th Cir. 1984).

The Social Security Regulations likewise require a careful examination of all relevant evidence in the record. *20* C.F.R. § 404.1527(d)(2). Social Security Ruling 96-8p requires a "thorough discussion and analysis of the objective medical and other evidence."

Despite deficiencies in the record that met the criteria for mental retardation, the ALJ did not consider these deficiencies when determining that Maggie Everette did not meet or equal a listing in the Listings of Impairments in step 3 of the evaluation process. The ALJ failed to analyze Maggie Everette's mental impairments under the categories supported by the clinical findings.

In addition to failing to properly review Everette's mental impairments the ALJ failed to properly categorize the severe physical impairments they did find. The ALJ in reviewing Everette's claim found that Everette suffered from severe medical impairments that limited Everette to light work. This finding was more than the minimal finding necessary to support a finding that Everette was disabled and entitled to disability compensation under the Social Security Act. This case presents the following questions:

1. DID THE ALJ ERR IN FINDING MAGGIE EVERETTE SEVERE MEDICALLY DETERMINABLE IMPAIRMENTS DID NOT MEET OR MEDICALLY EQUAL ONE OF THE LISTED IMPAIRMENTS IN APPENDIX I, SUBPART P, REGULATION NO. 4.

2. DID THE ALJ ERR BY FAILING TO ADDRESS IMPORTANT MEDICAL EVIDENCE IN THE RECORD WHICH TENDS TO PROVE THAT MAGGIE EVERETTE MEETS OR EQUALS LISTING 12.05 (C) PRIOR TO SEPTEMBER 1, 1987.

3. DID THE LOWER COURT ERR IN AFFIRMING THE ALJ DECISIONS.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND
STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

STANDARD OF REVIEW 5

ISSUES PRESENTED 6

STATEMENT OF THE FACTS 6

ARGUMENT 8

CONCLUSION 12

TABLE OF CASES AND AUTHORITIES

Branham v. Heckler,
775 F.2d 1271, 1274 (4th Cir. 1985) 10

Coffman v. Bowen,
820 F.2d 514 (4th Cir. 1987) 6

Cook v. Heckler,
783 F.2d 1168, 1173 (4th Cir. 1986) 9,11

Cunningham v. Harris,
658 F.2d 239 (4th Cir. 1981) 5

Flack v. Cohen, 413 F.2d 278 (4th Cir. 1972) 5

Gordon v. Schweiker,
725 F.2d 231, *236* (4th Cir. 1984) 9

Hayes v. Sullivan, 907 F.2d *1453,* (4th Cir. 1990) 5

Hines v. Bowen, 872 F.2d 56, 58 (4th Cir. 1989) 8

Laws v. Celebrezze,
368 F.2d 640, 642 (4th Cir. 1996) 5

Pullen v. Bowen,
820 F.2d 105, 109 (4th Cir. 1987) 11

Richardson v. Perales, 402 U.S. 389, 390,
401, 91 S.Ct. 420, 422, 427 (1971) 5

Smith v. Chater, 99 F.3d 635, 638 (4th Cir. 1996) 5

Smith v. Schweiker,
795 F.2d 343, 345 (4th Cir. 1986) 8

STATUTES AND AUTHORITIES

42 U.S.C. § 405(g) 5

20 C.F.R. §404.1520 and 1520(a)(1988) 8

20 C.F.R. §404.1527(d)(2) 9

20 C.F.R., Part 404, Subpart P, App. 1, § 12.00(A) 3

PETITION FOR WRIT OF CERTIORARI

Priscilla Everette-Oates, as personal representative for the estate of Maggie Oates, proceeding *pro se* respectfully petitions for a writ of certiorari to review the findings of the Administrative Law Judges and the decisions of the lower courts upholding said findings.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is cited as Priscilla Everette v. Jo Anne B. Barnhart, No. 04-2422 (4th Cir. 2005). The opinion of the District Court is unpublished and cited as Everette v. Barnhart, No. CA-02-48-H (E.D.N.C. Sept. 8, 2004).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 13, 2005. Petitioner filed a timely motion for rehearing, which was denied by an order filed August 9, 2005. The jurisdiction of this Court is invoked under Section *205(g)* of the Social Security Act, as amended, 42 U.S.C. § 405(g), and Section 1631(c)(3) of the Social Security Act, as amended, 42 U.S.C. §1383(c)(3), and 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §405(g) provides, in relevant part:

(g) Judicial review

...As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive...

App. at 40-41.

20 C.F.R. §404.1520 and 1520(a)(1988) provide in relevant part:

§ 404.1520 Evaluation of disability in general.

(a) Steps in evaluating disability. We consider all evidence in your case record when we make a determination or decision whether you are disabled. When you file a claim for a period of disability and/or disability insurance benefits or for child's benefits based on disability, we use the following evaluation process. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider the effect of your physical or mental impairment; if you have more than one impairment, we will also consider the combined effect of your impairments.

App. at 41-42.

20 C.F.R. §404.1527(d)(2) provides in relevant part:

(d) How we weigh medical opinions. Regardless of its source, we will evaluate every medical opinion we receive. Unless we give a treating source's opinion controlling weight

under paragraph (d)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion.

(1) Examining relationship. Generally, we give more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you.

(2) Treatment relationship.

App. at 42-43.

20 C.F.R., Part 404, Subpart P, App. 1, §12.00(A)

12.00 Mental Disorders

A. Introduction. The evaluation of disability on the basis of mental disorders requires documentation of a medically determinable impairment(s), consideration of the degree of limitation such impairment(s) may impose on your ability to work, and consideration of whether these limitations have lasted or are expected to last for a continuous period of at least 12 months.

App. at 43-46.

STATEMENT OF THE CASE

The procedural record is poorly documented because the original record upon which it is based could not be located by the Appeals Council. The information in the reconstructed record indicates that Ms. Maggie Everette, now deceased who's estate is represented by daughter Priscilla Everette-Oates (hereinafter, Petitioner), filed an application for a Period of Disability and Disability Insurance benefits on January 10, 1983. Petitioner applied for Disabled Widow's Insurance benefits on January 24,

1983 and Supplemental Security Income on April 1, 1983, alleging commencement of disability in January 1978. After a hearing before an Administrative Law Judge, a decision was issued on September 28, 1983 finding Petitioner was not disabled as defined by the Rules in the Social Security Act. The Appeals Council denied Petitioner's request for review on November 28, 1983. Petitioner then filed a request to be included in the Hyatt class. The Appeals Council remanded the case to an Administrative Law Judge for a new hearing and decision in accordance with the Order issued in the case of Hyatt v. Heckler. A hearing was held before an Administrative Law Judge and a decision dated June 29, 1987 was issued finding that Petitioner was not disabled. Petitioner applied again for a period of disability, Disability Insurance Benefits and Supplemental Security Income on September 9, 1987, alleging an onset of disability of October 15, 1975. Plaintiff was found disabled but was only eligible for Supplemental Security Income as of September 1, 1987.

Petitioner was determined in April 1989 to be a member of the *Hyatt v. Bowen* class and subsequently requested a review of her 1983 applications. An Administrative Law Judge determined that Plaintiff was not properly determined to be a member of the *Hyatt III* class (*Hyatt v. Shalala*). Upon remand by the Appeals Council, a hearing was held before Administrative Law Judge Stephen Jones, who issued a decision dated December 27, 2000 finding Petitioner was not disabled. The Appeals Council denied Petitioner's request to review the decision by ALJ Jones, making the ALJ's decision the

final administrative decision of the Social Security Administration and exhausting all of Petitioner's administrative remedies.

STANDARD OF REVIEW

In reviewing a final decision of no disability by the Commissioner, the *Court* must determine whether the Commissioner's decision is supported by substantial evidence, per 42 U.S.C. § 405(g), and whether the ultimate conclusions reached by the Commissioner are legally correct under controlling law. *Richardson v. Perales, 402* U.S. 389, 390, 401, 91 S.Ct. 420, 422, 427 (1971); *Hayes v. Sullivan,* 907 F.2d *1453,* (4th Cir. 1990).

The phrase "supported by substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Smith v. Chater, 99* F.3d 635, 638 (4th Cir. 1996). Elaborating on this definition, the Fourth Circuit has stated that the phrase "supported by substantial evidence" consists of evidence "of more than a scintilla of evidence, but may be somewhat less than a preponderance." *Hayes,* 907 F.2d at 1456 {quoting *Laws v. Celebrezze, 368* F.2d 640, 642 (4th Cir. 1996)}.

Moreover, the *Court* should closely scrutinize administrative proceedings in order to insure results consistent with congressional intent and elemental fairness. *Flack v. Cohen,* 413 F.2d 278 (4th Cir. 1972). Further, the conclusions of law of the Commissioner are not entitled to a presumption that they are correct. *Cunningham v. Harris, 658* F.2d 239 (4th Cir. 1981). Most importantly,

factual findings by and Administrative Law Judge are not binding if reached through the use of some improper standard or misapplication of law. *Coffman v. Bowen*, 820 F.2d 514 (4th Cir. 1987).

ISSUES PRESENTED

I. THE ALJ ERRED IN FINDING PETITIONER'S SEVERE MEDICALLY DETERMINABLE IMPAIRMENTS DID NOT MEET OR MEDICALLY EQUAL ONE OF THE LISTED IMPAIRMENTS IN APPENDIX I, SUBPART P, REGULATION NO. 4.

A. THE ALJ ERRED BY FAILING TO ADDRESS LMTORTANT MEDICAL EVIDENCE IN THE RECORD WHICH TENDS TO PROVE THAT PLALN'111-F MEETS OR EQUALS LISTING 12.05 (C) PRIOR TO SEPTEMBER 1, 1987,

STATEMENT OF THE FACTS

Petitioner was born on May 10, 1926. The reconstructed record contains evidence indicating that prior to September 1, 1997, Petitioner had severe medically determinable impairments including status post lumbar laminectomy with residual pain, hypertension and diabetes mellitus. In his decision dated December 27, 2000, ALJ Stephen Jones determined that between October 15, 1975 and September 1, 1987, Petitioner had the residual

functional capacity for light work, meaning she could lift up to 20 pounds, walk and stand six hours out of an eight-hour day, bend, stoop, and carry. The ALJ determined that Petitioner did not have any significant non-exertional limitations during this period. App. at 33.

In her decision dated March 18, 1997, ALJ Mary Bisantz stated that Petitioner underwent a Wechsler Adult Intelligence Scale-Revised test administered by Evans E. Harrell, Ph.D., which determined that Petitioner was suffering from mental retardation with a valid full-scale I.Q. of 66. On this basis, Petitioner was found to meet the criteria of the Listing of Impairments with onset of disability as of September 1, 1987. [Although the Listing is not cited in the ALJ's decision, the only Listing met by a claimant with a valid full-scale I.Q. between 60 and 69 and another severe medically determinable impairment, which does not meet or equal a Listing is 12.05(C).]. The ALJ states that prior to 1987 there was no evidence that Petitioner "suffered from any impairment singly or in combination which met or equaled the criteria of the Listing of Impairments or precluded her from performing her past work." App. at 12.

A Psychiatric Review Technique form was completed by W. Henry Perkins, Ph.D., DDS Psychological Consultant on 12/21/87. The Listing is cited under Section D of the form, titled Mental Retardation and Autism. Under Section D, Dr. Perkins checked the box, which states:

> Significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22), or

> pervasive developmental disorder characterized by social and significant communicative deficits originating in the developmental period, as evidenced by at least one of the following:

Dr. Perkins then checked the box which indicates that Petitioner meets Listing 12.05(C) based on a "valid verbal, performance, or full scale I.Q. of 60 to 69 inclusive and a physical or other mental impairment imposing additional and significant work-related limitation of function."

ARGUMENTS

The general procedure of a Social Security disability inquiry is well established. Five questions are to be asked sequentially during the course of a disability determination. §§ 20 C.F.R. 404.1520, 1520a (1988). An Administrative Law Judge must consider: (1) whether the claimant is engaged in substantial gainful activity; (2) whether the claimant has a severe impairment; (3) whether the claimant has an impairment that meets or equals a condition contained within the Social Security Administration's official list of impairments; (4) whether the claimant has an impairment which prevents past relevant work; and (5) whether the claimant's impairment prevents the performance of any substantial gainful employment. An ALJ's factual determinations must be upheld if supported by substantial evidence, *Smith v. Schweiker*, 795 F.2d 343, 345 (4th Cir. 1986). This Court is not so restrained in determining whether correct legal standards were applied. *Hines v. Bowen*, 872 F.2d 56, 58 (4th Cir. 1989).

The ALJ has a duty to weigh and address all the competent evidence in the record whichbears on the outcome. In the course of this analysis, "[t]he ALJ has a duty to explore all relevant facts and inquire into the issues necessary for adequate development of the record, and cannot rely only on the evidence submitted by the claimant when that evidence is inadequate." *Cook v. Heckler, 783* F.2d 1168, 1173 (4th Cir. *1986).* The Secretary must analyze all relevant evidence and state the weight afforded to the evidence before denying a claim for benefits. *Gordon v. Schweiker, 725* F.2d 231, *236* (4th Cir. 1984).

The Social Security Regulations likewise require a careful examination of all relevant evidence in the record. *20* C.F.R. § 404.1527(d)(2). Social Security Ruling 96-8p requires a "thorough discussion and analysis of the objective medical and other evidence."

THE ALJ ERRED IN FINDING PLAINTIFF'S SEVERE MEDICALLY DETERMINABLE IMPAIRMENTS DID NOT MEET OR MEDICALLY EQUAL ONE OF THE LISTED IMPAIRMENTS IN APPENDIX 1, SUBPART P, REGULATION NO. 4.

Petitioner was found by ALJ Stephen Jones to have the residual functional capacity for light work between October 15, 1975 and September 1, 1987. Petitioner was found by both ALJ Jones and ALJ Bisantz to meet or equal a Listing under the Regulations after September 1, 1987. Both ALJ Jones and ALJ Bisantz found Petitioner did not meet the Listing prior to September 1, 2001. ALJ Jones specifically determined that

Petitioner did not have any nonexertional impairments prior to September 1, *1987.*

The Fourth Circuit presumes mental retardation is a lifelong condition. *Branham v. Heckler,* 775 F.2d 1271, 1274 (4th Cir. 1985). *Branham* cites the very wording of Listing 12.05 for Mental Retardation as the basis for its decision, ruling that the Regulations "expressly define mental retardation as denoting 'a lifelong condition.'" Listing 12.05(C) states, in pertinent part:

> Listing 12.05(C). Mental Retardation: Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period;
>
> App. 46-47

The Listing unequivocally describes mental retardation as a lifelong condition. The evaluation by Dr. Perkins indicated frequent "deficiencies of concentration, persistence or pace resulting in Failure to complete tasks in a timely manner (in work settings or elsewhere)" Dr. Perkins's evaluation also noted repeated (three or more) "episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors)" (Id.)

A. THE ALJ ERRED BY FAILING TO ADDRESS IMPORTANT MEDICAL

EVIDENCE IN THE RECORD, WHICH TENDS TO PROVE THAT PLAINTIFF MEETS OR EQUALS LISTING 12.05 (C) PRIOR TO SEPTEMBER 1, 1987.

The ALJ did not consider these deficiencies in Plaintiffs level of mental functioning as a part of his determination that Petitioner did not meet or equal a listing in the Listings of Impairments at step three of the sequential evaluation process. App. at 23 - 32. A claimant's mental impairments, however, should be analyzed or reviewed under the categories supported by the individual's clinical findings. 20 C.F.R., Part 404, Subpart P, App. 1, §12.00 (A). The Commissioner "[h]as a duty to explore all relevant facts and inquire into the issues necessary for adequate development of the record" *Cook v. Heckler*, 783 F.2d 1168, 1173 (4th Cir. 1986), and §12.05(C) clearly defined the category under which Petitioner's mental impairment should be analyzed.

Listing 12.05(C) also requires the presence of a "physical or other mental impairment imposing additional and significant work related limitation of function." Such a significant work related limitation has been defined as one "[w]here the effect on the claimant's ability to work is more than slight or minimal." *Pullen v. Bowen*, 820 F.2d 105, 109 (4th Cir. 1987). Also, "[t]he significant limitation under section § 12.05(C) need not be disabling in and of itself . . . . therefore something less than a preclusion from any gainful employment must apply." *Id.* Both ALJ Jones and ALJ Bisantz found that Petitioner suffered from a

medically determinable severe impairment which limited Petitioner to light work. App. at 15 and 32-33. This limitation, though not precluding any gainful employment, has certainly more than a slight or minimal effect on claimant's ability to work. The ALJ failed to address this evidence and its implications in his decision. Contrary to the ALJ's decision, Petitioner met the criteria for Listing 12.05C prior to September 1, 1987. The ALJ's decision should therefore be reversed.

CONCLUSION

The psychological tests performed by Dr. Harrell in 1987, which were confirmed by Dr. Perkins on December 22, 1987 (showing that Petitioner has a Full Scale IQ of 66) are indicative of a lifelong condition. From October 15, 1975 to September 1, 1987. Petitioner also suffered from a medically determinable impairment which limited her residual functional capacity to light work. Therefore the ALJ erred by not finding Petitioner met Listing 12.05(C) from October 15, 1975 to September 1, 1987.

Fundamental fairness and efficiency require remand of this matter to the Commissioner. For the foregoing reasons, Petitioner seeks a reversal pursuant to sentence four of Section 405(G) and entry of judgment reversing the Commissioner's final decision. In the alternative, Petitioner seeks a reversal with remand pursuant to sentence four and entry of judgment reversing the Commissioner's final decision.

Respectfully submitted this the 13th day of November, 2005.

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APPENDIX TABLE OF CONTENTS

OPINION O F THE FOURTH CIRCUIT ..... A 1

JUDGMENT OF THE FOURTH CIRCUIT ..... A 3

DECISION OF THE OFFICE OF HEARINGS AND APPEALS ..... A 4

ORDER OF APPEALS COUNCIL ..... A 17

DECISION ON REMAND BY APPEALS COUNCIL A 19

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW ..... A 34

U.S. DISTRICT COURT JUDGMENT ..... A 37

FOURTH CIRCUIT DECISION ON PETITION FOR REHEARING ..... A 39

42 U.S.C. §405(g) ..... A 40

20 C.F.R. §404.1520 and 1520(a)(1988) ..... A 42

20 C.F.R. §404.1527(d)(2) ..... A 43

20 C.F.R., Part 404, Subpart P, App. 1, § 12.00(A) ... A 44

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-2422

PRISCILLA EVERETTE, as
personal representative the
estate of Maggie Everette,

Plaintiff - Appellant,

versus

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Malcolm J. Howard, District Judge. (CA-02-48-E)

Submitted: April 11, 2005
Decided: May 13, 2005

Before TRAXLER, KING, and GREGORY, Circuit Judges.

Affirmed by unpublished per curie opinion.

Priscilla Everette, Appellants Pro Se. Barbara Dickerson Kocher, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).
PER CURIAM:

Priscilla Everette, personal representative of the estate of Maggie Everette, appeals the district court's order granting the Commissioner of the Social Security Administration's ("Commissioner") motion for judgment on the pleadings and affirming the Commissioner's denial of disability insurance benefits, widow's insurance benefits, and supplemental security income benefits to Maggie Everette prior to 1987. We must uphold the decision to deny benefits if the decision is supported by substantial evidence and the correct law was applied. See 42 U.S.C. 5 405(g) (2000); Craig v. Chater, 76 F.3d 585, 589 (4th Cir. 1996). Having thoroughly reviewed the administrative record, we agree with the district court that substantial evidence supports the Commissioner's final decision denying benefits. Accordingly, we affirm for the reasons stated by the district court. See Everette v. Barnhart, No. CA-82-46-H (E.D.N.C. Sept. 8, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

JUDGMENT

FILED: May 13, 2005

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 04-2422
CA-02-43-H

PRISCILLA EVERETTE, as personal representative Of the estate of Maggie Everette

Plaintiff - Appellant

v.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY

Defendant - Appellee

Appeal from the United States District Court for the Eastern District of North Carolina at New Bern

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In accordance with the written opinion of this Court filed this day, the Court affirm the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment willtake effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR
	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
MAGGIE EVERETTE (Claimant)	
_____ (Wage Earner)	238-56-8869 (Social Security number)

PROCEDURAL HISTORY

The claimant filed applications for a period of disability and 'disability insurance benefits on January 10, 1983, disabled widow's insurance benefits on January 24, 1983, and supplemental security income benefits on April 1, 1983, alleging an inability to work since January NP, 1978. She was denied initially and on reconsideration. She filed a request for hearing before an Administrative Law Judge, and on September 28, 1983, a decision was issued finding that the claimant was not under a "disability within the meaning of the Social Security Act. The Appeals Council denied the claimant's request for review of that decision November 28, 1983.

The claimant subsequently completed a form indicating that she wanted to be made a member of the Swart class in order to have her case reviewed again, and on July 10, 1995, the

Appeals Council remanded the claimant's case to an Administrative Law Judge for a new hearing and decision in accordance with the Order of United States District Court for the Western District of North Carolina in the case of Patrick Hyatt et al., v. Margaret Heckler (Exhibit 29). Pursuant to the Appeals Council Remand, a hearing was held before an Administrative Law Judge and a decision dated June 29, 1987, was issued finding that the claimant was not disabled (Exhibit 33).

The claimant again filed applications for a period of disability, disability insurance benefits, and supplemental security income on September 9, 1987, alleging an onset of disability of October 15, 1975, and was subsequently found disabled for supplemental security income purposes only as of September 1, 1987, but not prior thereto, by state agency determination of January 5, 1988.

In April 1989, the claimant was determined to be a "deemed member" of the class in the can of Hyatt v. Bowen, (WDNC, December 10, 1987). She had requested a review of her 1983 applications as a member of the Hyatt class, and her case was referred to an Administrative *Law* Judge for Hyatt readjudication (Exhibit 36). However, the Administrative Law Judge found that the claimant did not meet the criteria for class membership in the case of Hyatt v. Bowen, and entitlement to readjudication of the June 29, 1987, determination. Accordin[illegible]ly, on November 13, 1990, the Administrative Law Judge dismissed the claimant's request for readjudication of her 1983 applications citing the fact that she was not properly determined to be a member of the class in the case of Hyatt v Bowen (Exhibit 45).

On November 21, 1994, the claimant requested review under Hyatt v. Shalala, No.C-C-893-655-MU (WDNC, March 21,

1994), and was subsequently identified as a Hyatt III class member and, as such, entitled to review of her applications for a period of disability and disability insurance benefits filed January 10, 1983, and September 9, 1987, widow's disability benefits filed January 24, 1983, and supplemental security income benefits filed April 1, 1983 (Exhibit 46). A hearing was held on January 24, 1987, in Greenville, North Carolina. The claimant appeared and testified and after being advised of her right to be represented, elected to proceed without representation. Barbara Everette, the claimant's daughter, also appeared and testified on her behalf.
The issues in this case are whether the claimant is under a "disability" as defined in section 216(i), 223, 1602, and 1614(a)(3) (A) of the Social Security Act and in accordance with the sequential evaluation process described in 20 CFR 404.1520 and 416.920 and, if so, when her disability commenced and the duration of the disability.

To be entitled to a period of disability and disability insurance benefits, an individual must meet the disability insured status requirements of the Act. To be found disabled for a period of disability, disability insurance benefits, and supplemental security income, an individual must not be performing substantial gainful activity and must have a "severe" impairment or combination of impairments which either meets or equals the criteria in the Listing of Impairments or prevents the individual from performing both work performed in the past and other work existing in significant numbers in the national economy (20 C.F.R. 404.1520 and 416.920).

To be entitled to widow's disability insurance benefits, an individual must have attained age 50, be the widow of the wage earner who died fully insured, unmarried, and establish that her disability started not later than seven years after the

insured died or after the individual was last entitled to survivor's benefits, whichever is later. To be found disabled for widow's insurance benefits for months prior to January 1991, an individual must have a disabling impairment which, of itself, was so severe that it met or equalled a set of criteria in the Listing of Impairments (20 CFR 404.1511).

DISCUSSION

After carefully reviewing all of the evidence, the Administrative Law Judge finds that the claimant met the disability insured status requirements of the Act as of the alleged onset date and continued to meet them through December 31, 1979, but not thereafter. The Administrative Law Judge further finds that the claimant attained age 50 as of June 9, 2976, is the widow of the wage earner who died fully insured, is unmarried, and meets the prescribed period requirements through April 30, 2986, but not thereafter.

The Administrative Law Judge concludes that the claimant has not engaged in substantial gainful activity since her alleged onset date due to severe impairments; however, prior to September 1, 1987, the date that disability was established for purposes of entitlement to supplemental security income benefits, the evidence does not support that the claimant suffered from an impairment which met or equalled the criteria in the Listing of Impairments or precluded her from returning to her past work as she described it. Thus, the Administrative Law Judge finds that the clamiant has not been disabled at any time prior to September 1, 1987.

The claimant has alleged an inability to work since October 15, 1975, due to a back problems, diabetes mellitus, hypertension, a nervous condition, arthritis, and sinus problems; however, the evidence of record reveals that prior to September 1, 1987, the claimant's severe impairments

caused only mild restrictions in her ability to work. In fact, prior to 1987 when Wechsler Adult Intelligence Scale-Revised testing by Evans E. Harrell, Ph.D., showed that the claimant was suffering from mental retardation with a valid full scale I.Q. was 66, and she was found to meet the criteria of the Listing of Impairments with onset of disability as of September 1, 1987 (See Exhibits 35 and 41), the evidence of record does not support a finding that the claimant suffered from any impairment singly or in combination which metor equalled the criteria of the Listing of Impairments or precluded her from performing her past work.

In a report dated September 13, 1987, the claimant's treating physician, P. L. Temple, M.D., indicated that the claimant had long standing hypertension and diabetes mellitus and was status post lumbar disc surgery. However, Dr. Temple was of the opinion that the claimant's above conditions only caused mild restrictions in her capacity to work and that she had a good prognosis. Dr. Temple's opinion is supported by his treatment records which reveal that the claimant's hypertension and diabetes mellitus have been well controlled with medications and diet. In fact, the evidence of record reveals that the claimant has only occasionally experienced episodes of elevated blood pressure or blood sugars, but during these periods, the claimant has either been off her medications or had an increase in her weight and with restart of her diet and medications has regained control of these conditions. Further, the medical record shows no evidence of end organ damage due to these conditions. While the claimant has been treated for flares of scleritis and keratitis sicca by David it. Anderson, M.D., these conditions have resolved with treatment, and the claimant's vision has remained essentially 20/20 in both eyes (Exhibits 21, 22, 25, 27, 37, 38, and 39).

The claimant was admitted to Wilson Memorial Hospital in February 1975 because of increasing low back pain and left sciatic and underwent lumbar laminectomy with excision of a herniated disc. However, the claimant reported to A. T. Jennette, M.D., in January 1976 that her left sciatic pain had improved with the use of a hard mattress and bedboard, and on examination at that time, she had no paravertebral muscle spasm in the lumbar area, negative straight leg raising bilaterally, and no point tenderness or leg length discrepancy.

Dr. Jennette noted at that time that he had nothing else to offer the claimant and suggested that she lose weight and continue the use of her bedboard. The claimant reported that her chronic back ache was fairly well controlled with Anacin or Tylenol when seen by Dr. Temple in April 1982. She had full range of motion of the lumbosacral spine on consultative examination by Dr. Sirisena in February 1983, and *x-ray* of the lumbosacral spine at that time showed no significant degenerative changes. She had no evidence of swelling, inflammation, or deformity of her joints, and there was full range of motion. Further, when examined by Dr. Sirisenain October 1987, there was no evidence of sensory, motor, or reflex changes on examination of the lumbar spine (Exhibits 21,22,24; 39, and 43).

Dr. Sirisena noted on consultative evaluation in February 1983 that the claimant appeared to suffer with chronic anxiety per her history. However, he indicated that there was no evidence of psychosis, and the claimant acknowledged that she had received no institutional treatment or mental health facility treatment for any mental condition. She stated at that time that she took a nerve pill which helped relieve her "nervous tension," a statement which she repeated when seen by Dr.. Sirisena in October1987. Further, the treatment records from Or.

Temple, her treating physician, do not reveal that the claimant reported any recurring and ongoing problems with anxiety ;Exhibits 21, 22, 25,27, 38, and 39).
The claimant has alleged difficulties with sinus problems; however, there are no records of treatment for any sinus condition. The claimant has a history of inactive pulmonary tuberculosis, fibrocaseous granuloma, confirmed by scalene node biopsy in May 1973, for which she has been followed at Carolina Clinic. She was hospitalized in November 1977 after x-rays showed an increase in her lung lesions and tissue was suggestive of caseating necrosis; however, no organism was found, and when seen in February 1978, the claimant was doing extremely well, had no symptoms of active tuberculosis, and clear lungs. She was hospitalized again in August 1979 after x-rays showed possible new infiltrates, but upon review of the pulmonary x-rays, it was determined that there was no evidence of any active sites of disease. The claimant continued to do well, and followup chest x-rays in November 1980 showed no changes. Her weight remained stable and x-rays continued to show no changes in November 1981. The treating physician noted at that time that the claimant had done extremely well over the past year and had been quite active with no acute problems. When last seen at the Carolina Clinic on April 21, 1983, the claimant had weight gain and was feeling good. There was no cough, sputum production, chills, fever, or other problems at that time, and the treating physician was of the opinion that the granuloma of the claimant's lungs was quiescent (Exhibits 23 and 24).

The claimant was diagnosed with hyperthyroidism after a thyroid scan in August 1979 was elevated. However, she was subsequently treated with RAI uptake, and when seen at the Carolina Clinic in December 1979, TSH level was normal and studies at that time showed that the claimant was not hypothyroid. Further, examination in October 1982

showed no evidence of thyroid enlargement. In fact, there are no records of treatment for a thyroid condition since 1979 (Exhibits 23 and 24).

The Administrative Law Judge has evaluated all of the claimant's symptoms, including pain, in accordance with Social Security Ruling (SSR) 96-7p, Fourth Circuit law as see forth in Hyatt v. Sullivan, 899 F.2d 329 (4th Cir. 1990), and 20 CFR 404.1529 and 416.929. The court in Hyatt set forth the following standard regarding the evaluation of pain:

> Once an underlying physical or mental impairment that could reasonably be expected to cause pain is shown by medically acceptable objective evidence, such as clinical or laboratory diagnostic techniques, the adjudicator must evaluate the disabling effects of a disability claimant's pain, even though its intensity or severity is shown only by subjective evidence. If an underlying impairment capable of causing pain is shown, subjective evidence of the pain, its intensity or degree can, by itself, support a finding of disability. Objective medical evidence of pain, its intensity or degree (i.e., manifestations of the functional effects of pain such as deteriorating nerve or muscle tissue, muscle spasm, or sensory or motor disruption), if available, should be obtained and considered. Because pain is not readily susceptible of objective proof, however, the absence of objective medical evidence of the intensity, severity, degree or functional effect of pain is not determinative.

Id. at 337.

In accordance with SSR 96-7p, Hyatt v. Sullivan, and 20 CFR 404.1529 and 416.929, the Administrative Law Judge has not required the presence of objective medical evidence in determining the intensity, severity, degree or functional

effect of the pain and other symptoms alleged. Specifically, the Administrative Law Judge has considered the nature, location, onset, duration, frequency, radiation, and intensity of any symptom, including pain; the precipitating and aggravating factors; the type, dosage, effectiveness, and adverse side effects of any medication; the treatment, other than medication, for relief of pain or other symptoms the claimant has undergone; the alleged functional restrictions; and the claimant's daily activities.

The claimant has alleged an inability to work since October 15, 1975, due back problems causing pain, diabetes mellitus, and hypertension. However, as is noted above, the evidence of record has revealed that the claimant's diabetes and hypertension has been well controlled with medication and diet. Further, despite her allegations of continued back pain subsequent to her lumbosacral surgery, the claimant testified at the hearing that the surgery in fact helped her pain and that she just never returned to work. She reported nervous tension but stated that it was relieved with medication. In fact, she testified that she was independent in living after her surgery. Her treating physician, Dr. Temple, indicated in his report of September 1987 that the above conditions caused only mild restrictions in her ability to work and that she had a good prognosis. When seen at the Carolina Clinic in November 1981, note was made that the claimant was quite active and suffering no acute problems at that time. Further, in a life activities questionnaire completed in January 1983, the claimant stated that she did housework, shopped, attended church, cooked, washed dishes, mopped, did laundry, and worked in her yard and garden. She indicated that she took care of her personal needs as well as cared for her teenage daughter.

She further reported that she visited and entertained friends

at home, all despite her statement that her medications made her sleepy. Additionally, the claimant reported to Dr. Harrell in December 1987 that she cleaned house, fixed meals, occasionally grocery shopped, and attended church. Thus, having considered all of the evidence, to include the testimony at the 'hearing, the Administrative Law Judge finds that prior to September 1, 1987, the date that disability was established for purposes of entitlement to supplemental security income benefits, the claimant suffered from status post laminectomy with residual pain, hypertension, and diabetes. However, the Administrative Law Judge concludes that the claimant's impairments did not singly or in combination meet or equal any Criteria in the Listing of Impairments or preclude her from lifting 20 pounds with frequent lifting and carrying of up to 10 pounds, walking or standing six hours out of an eight-hour workday, or sitting with some pushing or pulling of arm or leg controls prior to that date. The claimant did not suffer from any severe mental impairment prior to September 1, 1987, which imposed more than a minimal limitation on her ability to perform basic work-related functions. Thus, the Administrative Law Judge finds that prior to September 1, 1987, the claimant retained the residual functional capacity to perform a full range light work activity.

The claimant has past relevant work experience as a hospital maid which she indicated required lifting 15 to 20 pounds and standing approximately two hours and walking approximately six hours per day. This job, as the claimant has described it, would fall into the light category in terms of exertional requirements. As set forth above, prior to September 1, 1987, the claimant retained the residual functional capacity to perform a full range of light work activity. Accordingly, the Administrative Law Judge finds that the claimant could perform her past relevant work as a

hospital maid as she described it prior to September 1, 1987. Thus, the Administrative Law Judge finds that the claimant was not disabled at any time prior to September 1, 1987.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on October 15, 1975, the date the claimant stated she became unable to work, and continued to meet them through December 31, 1979, but not thereafter. The claimant met the prescribed period requirements of the Act through May 31, 1986, but not thereafter, is the widow of the wage earner, who died a fully insured individual on September 26, 1970, and is not married.

2. The claimant has not engaged in substantial gainful activity since October 15, 1975.

3. The medical evidence establishes that prior to September 1, 1987, the claimant had severe status post lumbar laminectomy with residual pain, hypertension, and diabetes mellitus, but that she did not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4, prior to this date.

4. The claimant's testimony at the hearing regarding her subjective complaints, including

pain, is not credible to the extent that prior to September 1, 1987, she would have been precluded from performing a full range of light work activity.

5. Prior to September 1, 1987, the claimant had the residual functional capacity to lift 20 pounds with frequent lifting and carrying of up to 10 pounds, walk and stand six hours out of an eight-hour workday, and sit with some pushing or pulling of arm or leg controls. Prior to September 1, 1987, the claimant did not suffer from any severe mental impairment which imposed more than a minimal limitation on her ability to perform basic work-related functions (20 CFR 404.1545 and 416.945).

6. The claimant's past relevant work as hospital maid, as she described it, did not require the performance of work-related activities precluded by the above limitation(s) (20 CFR 404.1565 and 416.965).

7. Prior to September 1, 1987, the claimant's impairments did not prevent her from performing her past relevant work.

8. The claimant was not under a "disability" as defined in the Social Security Act, at any time prior to September1, 1987 (20 CPR 404.1520(e) and 416.920(e)).

DECISION

It is the decision of the Administrative law Judge that, based

upon the applications filed on January 10, 1983, January 24, 1983, April 1, 1983, and September 9, 1987, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, is not entitled to widow's insurance benefits based on disability under section 202(e) of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614(a)(3))A) of the Act at anytime prior to September 1, 1987.

Mary E. Bisantz
Administrative Law Judge

March 18, 1997
Date

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL

REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

In the case of	Claim for
	Period of Disability Disability Insurance Benefits Supplemental Security Income
Maggie Everette (Claimant)	Widow's Insurance Benefits (Disability)
Julius Everette 239-48-3820 (Wage Earner) (Leave blank if same as above)	238-56-8869 (Social Security Number)

The Administrative Law Judge issued a decision on March 18. 1997. The claimant has asked the Appeals Council to review this decision.

The Appeals Council grants the request for review under the substantial evidence provisions of the Social Security Administration regulations (20 CFR 404.970 and 416.1470). Under the authority of 20 CFR 404.977 and 416.1477. the Appeals Council vacates the hearing decision and remands this case to an Administrative Law Judge for further proceedings, including a new decision.

The Appeals Council was unable to take action on the claimant's request for review at the time it *was* filed because the record upon which the Administrative Law Judge based his decision could not be located. When extensive efforts to locate the record were unsuccessful, it was decided to reconstruct it.

The Appeals Council has been nimble to locate or redevelop that evidence. Because of this, the Appeals Council is unable to determine whether the decision is supported by substantial evidence. Accordingly, the Appeals Council finds that the claimant should have an opportunity for a new hearing and decision on the issues raised by her applications.

The Administrative Law Judge will provide the claimant an opportunity for a new hearing and will also provide the claimant an opportunity to submit additional evidence. including any available medical evidence.
The Administrative Law Judge may take say further action needed to complete the administrative record.

The Appeals Council regrets the delay involved.

APPEALS COUNCIL

Mark E. Mika
Administrative Appeals Judge

Andrew E. Wakshul
Administrative Appeals Judge

Date:

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

ON REMAND BY THE APPEALS COUNCIL

DECISION

In the case of	**Claim for**
Maggie Everette (Claimant)	Period of Disability Disability Insurance Benefits Widow's Insurance Benefits (Disability) and Supplemental security income
Julius Everette (Deceased) (Wage Earner)	XREF: 239-48-3820 238-56-8869 (Social Security Number)

INTRODUCTION

This case is before the Administrative Law Judge pursuant to an Order of Remand issued by the Appeals Council on June 6, 2000, which vacated the hearing decision issued by an Administrative Law Judge on March 18, 1997, on the ground that the record upon which it was based could not be located and the Appeals Council was unable to determine if substantial evidence existed to support it. Since the Appeals Council could not locate or redevelop the evidence, the record has been reconstructed (Exhibits B16 and B14).

This case was before the previous Administrative *Law* Judge on the claimant's request for review of her prior claims pursuant to the Stipulation and Order of Settlement approved by the United States District Court for the Western District

of North Carolina in the case of Hyatt v. Shalala, No. C-C-83-665-MU (W.D.N.C., March 21, 1994). The claimant had been identified as a member of the Hutt III class by the Social Security Administration. The procedural history of this case is set out fully and succinctly in that hearing decision as follows: "The claimant filed applications for a period of disability and disability insurance benefits on January 10, 1983. disabled widow's insurance benefits on January 24. 1983. and supplemental security income benefits on April 1, 1983, alleging an inability to work since January NF, 1978. She was denied initially and on reconsideration. She filed a request for a hearing before an Administrative Law Judge, and on September 28, 1983, a decision was issued finding that the claimant was not under a 'disability' within the meaning of the Social Security Act. The Appeals-Council denied the claimant's request for review of that decision on November 28, 1983.

"The claimant subsequently completed a form indicating that she wanted to be made a member of the Hyatt class in order to have her case reviewed again, and on July 10, 1986, the Appeals Council remanded the claimant's case to an Administrative Law Judge for a new hearing and decision in accordance with the Order of United States District Court for the Western District of North Carolina in the case of Patrick Hyatt et al., v. Margaret Heckler (Exhibit 29). Pursuant to the Appeals Ccuncil Remand, a hearing was held before an Administrative Law Judge and a decision dated June 29, 1987, was issued finding that the claimant was not disabled (Exhibit 33).

"The claimant again filed applications for a period of disability. disability insurance benefits. and supplemental security income on September 9, 1987, alleging an onset of disability of October 15, 1975, and was subsequently found disabled for supplemental security income purposes only as

of September 1, 1987. but not prior thereto, by state agency determination of January 5, 1988.

"In April 1989, the claimant was determined to be a 'deemed member' of the class in the case of Hyatt v. Bowen, (WDNC, December 10, 1987). She had requested a *review* of her 1983 applications as a member of the Hyatt class, and her case was referred to an Administrative Law Judge for Hyatt readjudication (Exhibit 36). However, the Administrative Law Judge found that the claimant did not meet the criteria for class membership in the case of Hyatt v. Bowen, and entitlement to readjudication of the June 29, 1987, determination. Accordingly, on November 13, 1990, the Administrative Law Judge dismissed the claimant's request for readjudication of her 1983 applications citing the fact that she was not properly determined to be a member of the class in the case of Hyatt v. Bowen (Exhibit 45)" (Exhibit B14).

Pursuant to the current Order of Remand and the claimant's request for review of her several applications under the Hyatt v. Shalala decision, the undersigned Administrative Law Judge scheduled a hearing to be held on November 17, 2000. in Greenville. North Carolina. By letter dated October 16, 2000, the claimant waived her right to a hearing. Therefore, based on the claimant's waiver of her right to a hearing, the Administrative Law Judge has reviewed her applications for a period of disability, and disability insurance benefits filed on January 10, 1983. widow's disability benefits filed on January 24, 1983, and supplemental security income benefits filed on April 1, 1983, and September 9, 1987, under the Hyatt v. Shalala decision based on the evidence *of* record, as reconstructed, and without a formal hearing (Exhibits B 1, B3, and B6).

The general issues are whether the claimant is entitled to a period of disability, Disability Insurance Benefits, and Disabled Widow's Insurance Benefits under Sections 216(i), 223, and 202(e) of the Social Security Act, and whether she

was disabled under Section 1614(a)(3)(A) of the Act prior to September 1, 1987, the established date of disability. The specific issue is whether, prior to September 1, 1987, she was under a disability, which is defined as the inability to engage in any substantial gainful activity by reason of any medically detect finable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

With regard to the application for Disabled Widow's Insurance Benefits, additional issues are whether the claimant was the *widow* of the deceased wage earner. had attained age 50, was unmarried (unless one of the exceptions in 20 CFR 404.335(e) apply), and was under a disability that began no later than 7 years after the wage earner's death or 7 years after she was last entitled to Survivor's Benefits. To be found disabled for widow's insurance benefits *for* months prior to January 1991, the claimant must have had a disabling impairment which, of and by itself, was so severe that it met or equalled a set of criteria in the Listing of Impairments [20 CFR 404.1511(b)].

Upon reviewing all of the evidence of record. the undersigned Administrative Law Judge concludes the claimant was not disabled within the meaning of the Social Security Act prior to September 1, 1987.

EVALUATION OF THE EVIDENCE

To be entitled to a period of disability and disability insurance benefits, the claimant must meet the disability insured status requirements of the Act. To be found disabled for a period of disability, disability insurance benefits, and supplemental security income, she must not be performing

substantial gainful activity, and must have a "severe" impairment or combination of impairments which either meets or equals the criteria of an impairment that is included in the Listing of Impairments or prevents her from performing any past relevant work or other work that exists in significant numbers in the national economy [20 CFR 404.1520 and 416.920].

After carefully reviewing all of the evidence, the Administrative Law Judge finds that the claimant met the disability insured status requirements of the Act as of the alleged onset date and continued to meet them through December 31. 1979, the date her insured status expired. The f Administrative Law Judge further finds that the claimant attained the age of fifty years as of June 9, 1976, that she is the widow of the wage earner, Julius Everette. who died fully insured, that she is unmarried, and that she met the prescribed period requirements through April 30. 1986. The Administrative Law Judge further finds that the claimant did not engage in substantial gainful activity between October 15. 1975, her alleged onset date. and September I. 1987. the date her disability was established for purposes of eligibility for supplemental security income (Exhibit B4).

A medically determinable impairment or combination of impairments is severe if it significantly limits an individual's physical or mental ability to do basic work activities (20 CFR §§ 404.1521 and 416.921). The Regulations require that if a severe impairment exists. all medically determinable impairments must be considered in the remaining steps of the sequential analysis (20 CFR §§ 404.1523 and 416.923). MAGGIE EVERETTE (238-56-8869)

The medical evidence indicates that, prior to September I. 1997. the claimant had severe impairments o f status post lumbar laminectomy with residual pain, hypertension, and

diabetes mellitus. but that she did not have an impairment or combination of impairments that met or medically equalled one of the impairments listed in Appendix I. Subpart P, Regulations No. 4. A determination must therefore be made whether she retains the residual functional capacity to perform the requirements of her past relevant work or other work existing in significant numbers in the national economy. The term "residual functional capacity" is defined in the Regulations as the most an individual can still do after considering the effects of physical and/or mental limitations that affect the ability to perform work-related tasks (20 CFR §§ 404.1545 and 416.945 and Social Security Ruling 96-8p).

In making this assessment the undersigned must consider all symptoms. including pain, and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence based on the requirements of 20 CFR §§ 404.1529 and 416.929, and Social Security Ruling 96-7p.. The undersigned must also consider any medical opinions, which are statements from acceptable medical sources. which reflect judgments about the nature and severity of the impairments and resulting limitations (20 CFR §§ 404.1527 and 416.927 and Social Security Rulings 96-2p and 96-6p).

The evidence shows that the claimant has been followed and treated for medical problems at the Tarboro Clinic since at least 1974. The progress notes of Dr. Peter L. Temple, the claimant's treating physician there, show that she was seen on September 14. 1974. for complaints "...of pain in the retrostemal area radiating around under both costal margins to the infracapular areas". Dr. Temple's examination of her neck heart, lungs, and abdomen was negative. A chest x-ray and electrocardiogram were normal. His impression was

functional pain versus upper G. I. discomfort. When the claimant returned on September 23, 1974, Dr. Temple noted that she was "still having problems with what sounds like left sided sciatica of a mild degree. "The examination today reveals no back tenderness or spasm. Straight leg raising is negative. Reflexes are all right". On May 27, 1975, his impression was that the claimant's essential hypertension was well controlled. On October 7, 1975, he treated her for a diagnosis of acute tonsillitis (Exhibit B17).

On her visit of April 7, 1976, to the Tarboro Clinic, the claimant was seen by Dr. Charles M. Almond who noted that she "had small amount of dizziness and headache yesterday, but otherwise has been asymptomatic since her last visit". His assessment was that her hypertension was under good control. On May 3, 1976 and August 24, 1976, Dr. Temple said that the claimant's blood pressure was "doing well" and on her visit of December 10, 1976, he noted that "she has no complaints". Dr. Temple's impression on December 13, 1976, was that the claimant had diabetes and his notes show that she received diabetic teaching and was instructed in 1500 diabetic diet. His notes of March 21, 1977, state that her diabetes and blood pressure were well controlled and on September 16, 1977, he said that "all conditions doing well". On December 16, 1977, the claimant reported no complaints. On her visits of March 17. 1978, and January 23. 1979, Dr. Temple said that her diabetes and blood pressure were well controlled. This was his observation also on her visits of June 5, 1980, September 15, 1980, January 15, 1981, April 16. 1981, June 21, 1982, and June 27, 1983. In his notes of March 14, 1985, Dr. Temple said that the claimant had some minor discomforts in her disc surgery scar and noted that her blood sugar was well controlled. On January 19. 1986, he stated that "(Other than having an urinary tract infection. she is doing quite well". In her follow up visit of January 12, 1988, for check of her blood sugar and blood pressure, he

said that she had "no complaints except for a twinge or twitch in her anterior chest at times". On April 15, 1988, he said that her diabetes and blood pressure were fairly stable (Exhibit B 17).

In the hearing decision issued on March 18, 1997, the Administrative Law Judge referred to a report that is dated September 13, 1987, in which Dr. Temple expressed the opinion that the claimant's impairments "...only caused mild restrictions in her capacity to work and that she had a good prognosis". This opinion is supported by Dr. Temple's treatment records which are set out above. They demonstrate that the claimant's diabetes mellitus and hypertension were well controlled almost all the time and when there was poor control it was attributed to her failure to follow her diet or take her medications. The Administrative Law Judge noted that there was no evidence of any end organ damage from these impairments (Exhibits B14 and B17).

The hearing decision also included the following evidence: "The claimant was admitted to Wilson Memorial Hospital in February 1975 because of increasing low back pain and left sciatic and underwent lumbar laminectomy with excision of a herniated disc. However, the claimant reported to A. J. Jeanette, M.D., in January 1976 that her left sciatica pain had improved with the use of a hard mattress and bedboard, and on examination at that time, she had no paravertebral muscle spasm in the lumbar area negative straight leg raising bilaterally, and no point tenderness or leg length discrepancy.

"Dr. Jeanette noted at that time that he had nothing else tooffer the claimant and suggested that she lose weight and continue the use of her bedboard. The claimant reported that her chronic back ache was fairly well controlled with Anacin or Tylenol when seen by Dr. Temple in April 1982. She had

full range of motion of the lumbosacral spine on consultative examination by Dr. Sirisena in February 1983, and x-ray of the lumbosacral spine at that time showed no significant degenerative changes. She had no evidence of swelling, inflammation, or deformity of her joints, and there was full range of motion. Further, when examined by Dr. Sirisena in October 1987, there was no evidence of sensory, motor, or reflex changes on examination of the lumbar spine (exhibit numbers omitted).

"Dr. Sirisena noted on consultative evaluation in February 1983 that the claimant appeared to suffer with chronic anxiety per her history. However, he indicated that there was no evidence of psychosis, and the claimant acknowledged that she had received no institutional treatment or mental health facility treatment for any mental condition. She stated at that time that she took a nerve pill which helped relieve her `nervous tension', a statement which she repeated when seen by Dr. Sirisena in October 1987. Further, the treatment records from Dr. Temple, her treating physician do not reveal that the claimant reported any recurring and ongoing problems with anxiety" (exhibit numbers omitted).

The hearing decision also states that "(t)he claimant was diagnosed with hyperthyroidism after a thyroid scan in August 1979 was elevated. *However,* she was subsequently treated with RAI uptake. and when seen at the Carolina Clinic in December 1979, TSH level was normal and studies at that time showed that the claimant was not hypothyroid. Further.'examination in October 1982 showed no evidence of thyroid enlargement In tact there are no records of treatment for a thyroid condition since 1979" (exhibit numbers omitted).

The hearing decision sets out that the claimant testified at that hearing that her lumbosacral surgery helped to relieve

her pain and that she just never returned to work. It said that "(f)urther, in a life activities questionnaire completed in January 1983, the claimant stated that she did housework. shopped. attended church, cooked, washed dishes, mopped, did laundry. and worked in her yard and garden. She indicated that she took care of her personal needs as well as cared for her teenage daughter. She further reported that she visited and entertained friends at home. all despite her statement that her medications made her *sleepy*. Additionally, the claimant reported to Dr. Harrell in December 1987 that she cleaned house, fixed meals, occasionally grocery shopped, and attended church" (Exhibit B14).

This evidence fails to demonstrate that the claimant's impa'rments prevented her from performing substantial gainful activity on a sustained basis prior to September I. 1987. What the evidence does demonstrate is that she had improvement in her pain following her lumbosacral surgery and that over the years her diabetes mellitus and blood pressure were controlled by medication and diet under the auspices of Dr. Temple. Following her back surgery. she underwent a consultative evaluation in February 1983 by Dr. Sirisena whose examination showed a full range of motion and no evidence of swelling, inflammation, or deformity of her joints. An x-ray taken of the lumbosacral spine taken at that time showed no significant degenerative changes. When Dr. Sirisena examined the claimant again in October 1987 he found no evidence of sensory, motor or reflex changes of the lumbar spine. It is noteworthy to observe that the rates of Dr. Temple, which cover a period of time from 1974 to 1988, rarely allude to the claimant's back surgery and/or mention any complaints by her of back pain and, or of incapacity. For example, his notes of April 20. 1982, state that, other than her hypertension and diabetes, "(s)he has no other

complaints or problems except for a chronic backache related to previous disc surgery many years ago. This is fa'rly well controlled on Anacin and or Tylenol". His treatment notes and objective medical findings over those many years simply do not support the claimant's allegation that her impairments during this time were disabling.

Based on this evidence, it is reasonable to conclude that between October 15, 1975, and September 1, 1987, the claimant was able to engage in work that involved standing and walking for prolonged periods of time, bending, stooping, and carrying, and lifting up to twenty pounds at a time. Thus, during this period of time. she retained the residual functional capacity to perform a full range of light work activity on a sustained basis.

The Administrative Law Judge has evaluated all of the claimant's symptoms, including pain, in accordance with 20 CFR 404.1529 and 416.929, Social Security Rulings (SSR) 96-3p. 96-4p, 96-7p, and Fourth Circuit law, including Hyatt v. Sullivan. In accordance with the above, once the medical signs or laboratory findings show that the claimant has a medically determinable impairment that could reasonably be expected to produce the alleged symptoms, such as pain, the Administrative Law Judge must evaluate the alleged intensity and persistence of the claimant's symptoms by considering all of the available evidence. The undersigned has not required the presence of objective medical evidence in determining the intensity and persistence of the pain and other symptoms alleged. Rather, the Administrative Law Judge has specifically considered the nature, location, onset, duration, frequency, radiation. and intensity of any symptom. including pain; the precipitating and aggravating factors; the type. dosage, effectiveness, and adverse side effects of any medication; the treatment other than medic; for relief of pain

or other symptoms the claimant has undergone: the alleged functional restrictions; and the claimant's daily activities.

As explained previously, although the evidence shows that from October 15, 1975, to September 1, 1987, the claimant had a medically determinable impairment that could reasonably be expected to produce the pain and other symptoms alleged, it does not support her allegations of the intensity and persistence of such pain and other symptoms.

Specifically, the treatment notes of the Tarboro Clinic show that the claimant had an uneventful post-operative course following her back surgery in *1975.* She said afterwards that it had improved her pain. In April 1982 Dr. Temple said that her back pain was fairly well controlled on Anacin and or Tylenol. Implicit in that comment is that her pain was rather mild and not at a level where she required prescription pain medication such as Percocet or Darvocet. Her treatment notes also show that her hypertension and diabetes mellitus have been well controlled on medications and diet. All of this evidence is consistent with the conclusion of the Administrative Law Judge that the claimant had the capacity to perform a full range of light work on a regular and continuing basis from October 15, 1975, to September 1, 1987.

Based upon the claimant's residual functional capacity for a full range of light work, the Administrative Law Judge must determine whether the claimant can perform any of her past relevant work. The phrase "past relevant *work"* is defined in the Regulations at 20 CFR 33 404.1565 and 416.965. The work usually must have been performed within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work. must have lasted long enough for the claimant to learn to do the job and meet the

definition of substantial gainful activity.

The evidence in this case establishes that the claimant has past relevant work as a hotel maid during the period of time under consideration. In her disability reports she said that she cleaned patients' rooms and that this entailed lifting, mopping floors, making beds, and cleaning bathrooms. In the hearing decision the Administrative Law Judge said that the claimant indicated that this work "...required lifting 15 to 20 pounds and standing approximately two hours and walking approximately six hours per day". Accordingly, this past relevant work. as the claimant described it. would fall into the light category in terms of exertional requirements. Thus, she could have returned to this work during the period of time from October 15, 1975, and September 1, 1987. She could have returned to this work as she had performed it (Exhibits B 11, B12, and B14).

Accordingly, the undersigned finds the claimant was not under a disability as defined in the Social Security Act, at any time prior to September 1, 1987 (20 CFR §§ 404.1520(e) and 416.920(e)).
The claimant is currently receiving supplemental security income benefits.

FINDINGS

After careful consideration of the entire record, the administrative Law Judge makes the following findings:

1. The claimant met the nondisability requirements fora period of disability and Disability Insurance Benefits set forth in Section 216(i) of the Social Security Act on October 15, 1975, the date she stated that she could no longer work, and continued to meet them through

December 31, 1979, the date her insured status expired.

2. The claimant meets all of the nondisability requirements for Disabled Widow's Insurance Benefits set forth in Section 202(e) of the Social Security Act. Her prescribed period begins April 30, 1983, and ends April 30, 1986.

3. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.

4. The medical evidence establishes that before September 1, 1987. the claimant had severe impairments of status post lumbar laminectomy with residual pain, hypertension, and diabetes mellitus.

5. The claimant's medically determinable impairments that existed prior to September 1, 1987, did not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4.

6. The undersigned finds the claimant's allegations regarding her limitations during the period of time in question are not consistent with the evidence as set forth in the body of the decision.

7. The undersigned has carefully considered all of the medical opinions in the record regarding the severity of the claimant's impairments (20 CFR §§ 404.1527 and 416.927).

8. Prior to September 1, 1987, the claimant had the residual functional capacity to lift up to 20 pounds, walk and stand six hours out of an eight-hour day, bend, stoop, and carry. Thus, she could have performed a full range of light work activity on a sustained basis between

October 15, 1975, to September 1, 1987. She did not have any significant non-exertional limitations during this period of time.

9. The claimant's past relevant work as a hospital maid, as she described it, did not require the performance of work-related activities precluded by her residual functional capacity as set out in Finding Number 8, above (20 CFR §§ 404.1565 and 416.965).

10. Prior to September 1, 1987, the claimant's medically determinable impairments of status post lumbar laminectomy with residual pain, hypertension, and diabetes mellitus did not prevent her from performing her past relevant work.

11. The claimant was not under a "disability" as defined in the Social Security Act, at any time prior to September 1,1987 (20 CFR §§ 404.1520(e) and 416.920(e)).

DECISION

It is the decision of the Administrative Law Judge that, based on the applications filed on January 10, 1983, January 24, 1983, April 1, 1983, and September 9, 1987, the claimant is not entitled to a period of disability, Disability Insurance Benefits, Disabled Widow's Insurance Benefits, and not eligible for Supplemental Security Income payments under Sections 216(i), 223, 202(e), 1602, and 1614(a)(3)(A) respectively, of the Social Security Act at any time prior to September 1, 1987.

STEPHEN A. JONES
Administrative Law Judge
27 DEC 2000
Date

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHBB
Appeals
238-56-8869
X-ref: 239-48-3820

Office of Hearings and

5107 Leesburg Pike
Falls Church, VA 22041-3255

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Priscella Everette
o/b/o Ms. Maggie Everette
316 Russell Drive
Tarboro, NC 27886

Dear Ms. Everette:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on December 27, 2000.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970 and 416.1470).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Commissioner of Social Security in your case. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

The Appeals Council has also considered the contentions raised in your representative's brief dated February 2, 2001, that Maggie Everette's past relevant work as a hospital maid required more than light exertion. The Dictionary of Occupational Titles (DOT) defines cleaner, housekeeping (any industry), alternate titles: maid, 323.687-014, performed at the light exertional level. The description of duties provided in the DOT reflects the claimant's duties, as she performed it, described in Exhibits B-11 and B-12. Further, the contention regarding illiteracy is contrary to Exhibit B-11, page 2, which indicates She can read English. The DOT also shows that the light maid position is unskilled (SVP 2).

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42

U.S.C. 405(g) and 1383(c)(3)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building. 6401 Security Boulevard. Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

original signed by
Elizabeth C. Palacios
Appeals Officer

cc:
Michael J. Jacula, Esq.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

PRISCILLA EVERETTE as
the Personal Representative
of the Estate of Maggie Everette,
Plaintiff

v.

JUDGMENT IN A CIVIL CASE
CASE NO. 4:02-CV-48-H1

JO ANNE B. BARNHART,
Commissioner of Social Security,
Defendant

_____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the court hereby denies the plaintiff's motion for judgment on the pleadings, grants the defendant's motion for judgment on the pleadings and upholds the decision of the Commissioner.

SO ORDERED - s/Malcolm J. Howard, United States District Judge

This Judgment filed and entered on September 8, 2004 and copies mailed to:

Michael J. Jacula
Attorney at Law
1002 Durham Rd.

Suite 1000
Wake Forest, NC 27587

David J. Cortes
Assistant United States Attorney
310 New Bern Avenue
Suite 800
Raleigh, NC 27601

September 8, 2005
Date

MICHAEL D. BROOKS
Acting Clerk

(By) Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 9, 2005

No. 04-2422
CA-02-48-H

PRISCILLA EVERETTE, as personal representative of the estate of Maggie Everette

Plaintiff - Appellant

v.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY

Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Traxler, Judge King, and Judge Gregory.

For the Court,

/s/ Patricia S. Connor

42 U.S.C. §405(g) provides, in relevant part:

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner

of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

20 C.F.R. §404.1520 and 1520(a)(1988) provide in relevant part:

§ 404.1520 Evaluation of disability in general.

(a) Steps in evaluating disability. We consider all evidence in your case record when we make a determination or decision whether you are disabled. When you file a claim for a period of disability and/or disability insurance benefits or for child's benefits based on disability, we use the following evaluation process. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider the effect of your physical or mental impairment; if you have more than one

impairment, we will also consider the combined effect of your impa'rments. Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity, your past work, and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review your claim further. Once you have been found entitled to disability benefits, we follow a somewhat different order of evaluation to determine whether your entitlement continues, as explained in § 404.15940)(6).

20 C.F.R. §404.1527(d)(2) provides in relevant part:

(d) How we weigh medical opinions. Regardless of its source, we will evaluate every medical opinion we receive. Unless we give a treating source's opinion controlling weight under paragraph (d)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion.

(1) Examining relationship. Generally, we give more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you.

(2) Treatment relationship. Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating sources opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory

diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed in paragraphs (d)(2)(i) and (d)(2)(ii) of this section, as well as the factors in paragraphs (d)(3) through (d)(6) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.

(i) Length of the treatment relationship and the frequency of examination. Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the source's opinion more weight than we would give it if it were from a nontreating source.

(ii) Nature and extent of the treatment relationship. Generally, the more knowledge a treating source has about your impairment(s) the more weight we will give to the source's medical opinion. We will look at the treatment the source has provided and at the kinds and extent of examinations and testing the source has performed or ordered from specialists and independent laboratories. For example, if your ophthalmologist notices that you have complained of neck pain during your eye examinations we will consider his or her opinion with respect to your neck pain, but we will give it less weight than that of another physician who has treated you for the neck pain. When the treating source has reasonable knowledge of your impairment(s), we will give the source's opinion more weight than we would give it if it were from a nontreating source.

20 C.F.R., Part 404, Subpart P, App. 1, § 12.00(A)
12.00 Mental Disorders

A. Introduction. The evaluation of disability on the basis of mental disorders requires documentation of a medically determinable impairment(s), consideration of the degree of limitation such impairment(s) may impose on your ability to work, and consideration of whether these limitations have lasted or are expected to last for a continuous period of at least 12 months. The listings for mental disorders are arranged in nine diagnostic categories: Organic mental disorders (12.02); schizophrenic, paranoid and other psychotic disorders (12.03); affective disorders (12.04); mental retardation (12.05); anxiety-related disorders (12.06); somatoform disorders (12.07); personality disorders (12.08); substance addiction disorders (12.09); and autistic disorder and other pervasive developmental disorders (12.10). Each listing, except 12.05 and 12.09, consists of a statement describing the disorder(s) addressed by the listing, paragraph A criteria (a set of medical findings), and paragraph B criteria (a set of impairment-related functional limitations). There are additional functional criteria (paragraph C criteria) in 12.02, 12.03, 12.04, and 12.06, discussed herein. We will assess the paragraph B criteria before we apply the paragraph C criteria. We will assess the paragraph C criteria only if we find that the paragraph B criteria are not satisfied. We will find that you have a listed impairment if the diagnostic description in the introductory paragraph and the criteria of both paragraphs A and B (or A and C, when appropriate) of the listed impairment are satisfied. The criteria in paragraph A substantiate medically the presence of a particular mental disorder. Specific symptoms, signs, and laboratory findings in the paragraph A criteria of any of the listings in this section cannot be considered in isolation from the description of the mental disorder contained at the beginning of each listing category. Impairments should be analyzed or reviewed under the mental category(ies) indicated by the medical findings. However, we may also consider mental impairments under physical body system listings, using

the concept of medical equivalence, when the mental disorder results in physical dysfunction. (See, for instance, 12.00D12 regarding the evaluation of anorexia nervosa and other eating disorders.)

The criteria in paragraphs B and C describe impairment-related functional limitations that are incompatible with the ability to do any gainful activity. The functional limitations in paragraphs B and C must be the result of the mental disorder described in the diagnostic description, that is manifested by the medical findings in paragraph A. The structure of the listing for mental retardation (12.05) is different from that of the other mental disorders listings. Listing 12.05 contains an introductory paragraph with the diagnostic description for mental retardation. It also contains four sets of criteria (paragraphs A through D). If your impairment satisfies the diagnostic description in the introductory paragraph and any one of the four sets of criteria, we will find that your impairment meets the listing. Paragraphs A and B contain criteria that describe disorders we consider severe enough to prevent *your* doing any gainful activity without any additional assessment of functional limitations. For paragraph C, we will assess the degree of functional limitation the additional impairment(s) imposes to determine if it significantly limits your physical or mental ability to do basic work activities, i.e., is a "severe" impairment(s), as defined in Sec. Sec. 404.1520(c) and 416.920(c). If the additional impairment(s) does not cause limitations that are "severe" as defined in Sec. Sec. 404.1520(c) and 416.920(c), we will not find that the additional impairment(s) imposes an additional and significant work-related limitation of function," even if you are unable to do your past work because of the unique features of that work. Paragraph D contains the same functional criteria that are required under paragraph B of the other mental disorders listings. The structure of the listing for substance addiction disorders, 12.09, is also different from that for the

other mental disorder listings. Listing 12.09 is structured as a reference listing; that is, it will only serve to indicate which of the other listed mental or physical impairments must be used to evaluate the behavioral or physical changes resulting from regular use of addictive substances. The listings are so constructed that an individual with an impairment(s) that meets or is equivalent in severity to the criteria of a listing could not reasonably be expected to do any gainful activity. These listings are only examples of common mental disorders that are considered severe enough to prevent an individual from doing any gainful activity. When you have a medically determinable severe mental impairment that does not satisfy the diagnostic description or the requirements of the paragraph A criteria of the relevant listing, the assessment of the paragraph B and C criteria is critical to a determination of equivalence. If your impairment(s) does not meet or is not equivalent in severity to the criteria of any listing, you may or may not have the residual functional capacity (RFC) to do substantial gainful activity (SGA). The determination of mental RFC is crucial to the evaluation of your capacity to do SGA when your impairment(s) does not meet or equal the criteria of the listings, but is nevertheless severe. RFC is a multidimensional description of the work-related abilities you retain in spite of your medical impairments. An assessment of your RFC complements the functional evaluation necessary for paragraphs B and C of the listings by requiring consideration of an expanded list of work-related capacities that may be affected by mental disorders when your impairment(s) is severe but neither meets nor is equivalent in severity to a listed mental disorder.

20 C.F.R., Part 404, Subpart P, App. 1, Part A § 12.05 Mental Retardation and Autism: Mental retardation refers to a significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the

developmental period (before age 22). (Note: The scores specified below refer to those obtained on the WAIS, and are used only for reference purposes. Scores obtained on other standardized and individually administered tests are acceptable, but the numerical values obtained must indicate a similar level of intellectual functioning.) Autism is a pervasive developmental disorder characterized by social and significant communication deficits originating in the developmental period.

The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

A. Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing, or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded;

OR

B. A valid verbal, performance, or full scale IQ of 59 or less;

OR

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function;

OR

D. A valid verbal, performance, or full scale IQ of 60 through 70, or in the case of autism, gross deficits of social and communicative skills, with either condition resulting in two of the following:

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning; or

3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or eleswhere); or

4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).